Supreme Court, U.S.
FILED

No. 961506 MAR 20 1997

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In The

Supreme Court of the United States

October Term, 1996

EMERSON ELECTRIC COMPANY,

Cross-Petitioner,

vs.

KAREN KARCHER,

Cross-Respondent.

Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an employee may maintain a federal lawsuit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17, for monetary damages for retaliatory action taken against another employee.

2. Whether the improper failure to instruct a jury on the *prima facie* elements of a Title VII case of disparate treatment and retaliation results in reversible error.

RULE 29.6 STATEMENT

Cross-Petitioner Emerson Electric Company, defendant below, has no parent corporation. Its nonwholly owned domestic subsidiaries are Vermont America Corporation and McGill Manufacturing Company.

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Rule Cited:

Supreme Court Rule 12.5 1

Emerson Electric Company ("Emerson") respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in *Karcher v. Emerson Electric Company,* 94 F.3d 502 (8th Cir. 1996).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 94 F.3d 502 and is reprinted in the appendix to Petitioner's petition for writ of certiorari [hereinafter "Pet. App."] at pp. A-1 to A-14. The order of the court of appeals denying Emerson's Petition for Rehearing and Suggestion for Rehearing En Banc is unreported and is reprinted at Pet. App. A-15.

STATEMENT OF JURISDICTION

The Eighth Circuit Court of Appeals issued its decision and judgment herein on September 4, 1996. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on November 13, 1996. Cross-Respondent/Petitioner Karen Karcher ("Petitioner" or "Karcher") filed her petition for writ of certiorari on February 5, 1997 and the petition was placed on the docket on February 18, 1997.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 12.5 of the Rules of the Supreme Court of the United States and is conditional upon this Court's grant of Petitioner's petition for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provision of Article III of the United States Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2 (as amended by the Eleventh Amendment).

Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer —
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (2) to limit, segregate, or classify his

> employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 2000e-3(a) of Title VII provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Section 2000e-5(f)(1) of Title VII provides:

> If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing

> of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the commission, by any persons whom the charge alleges was aggrieved by the alleged unlawful employment practice.

STATEMENT OF THE CASE

Emerson Electric Company twice denied employee Karen Karcher two separate job bids to a position for which she was not qualified. It also issued her one disciplinary warning, which was later removed from her personnel file and advised her husband, a supervisory employee at Emerson, that a conflict of interest had developed between his duty to the company and his obligations to his wife. As a result of these four actions, a jury awarded Karcher five hundred and twenty-five thousand dollars ($525,000) in damages on her claims of sex discrimination and retaliation under Title VII of the Civil Rights Act of 1964, as

amended, 42 U.S.C. § 2000e-5, and the Missouri Human Rights Act ("MHRA"), Mo. Rev. Stat. § 213.050. Of that amount, only $25,000 was awarded for lost wages and benefits; the remainder of the award was for emotional distress and punitive damages.

Karcher was employed at Alco Controls ("Alco"), a division of Emerson, in its St. Louis, Missouri facility, which manufactures refrigeration parts. Alco's machine shop utilized several different types of machinery, including "bar feed" equipment and "automatic chucker" equipment. Both the bar feed and the automatic chucker equipment required the utilization of operators and "set-up" workers. Those who "set up" the equipment initially prepared the stations and set up the tools within the machines to enable the equipment to produce a specific part. The set-up person then maintained the tooling when the equipment malfunctioned or the tooling became dull during operation. After the machine was set up, the operator was responsible for actually operating the equipment and maintaining the quality of the parts, while the set-up worker repaired any malfunctioning parts.

In 1988, Alco purchased four new bar feed and automatic chucker machines, costing between $95,000 and $98,000 each. The new equipment was operated in the same way as the old machinery, except that the new machines were set up through the use of computers, while the old were still set up manually. The older bar feed and automatic chucker equipment continued to be used in the machine shop.

When the new machinery was put into operation in 1988, pursuant to the requirements of its collective bargaining agreement, the company met with the union representing its workers to determine the job classification, pay rate and qualifications necessary to award the new set-up jobs for the equipment. The evidence at trial was undisputed that Alco and

the union eventually agreed that set-up jobs on the new equipment would be classified as "Group 6 General Machine Shop Set-Up" [hereinafter "Group 6 Set-Up"].

The collective bargaining agreement provided that when a job opening became available, a listing would be posted, and "[t]he job opening will be filled with seniority being the deciding factor, where skill, ability and physical fitness of the employees' [sic] being considered are relatively equal." Six of seven witnesses at trial testified that the union and the company agreed that, at least after the first six months the new equipment was operating, the "skill and ability" required by the collective bargaining agreement for the set up jobs on the new equipment would be determined by prior set up experience on the machines being replaced.[1] The company and the union agreed that the senior bidder with prior set-up experience on the appropriate equipment would be awarded the position. No employees were trained for these positions and those who were awarded the positions were also required to set up manually the old machines, which were still in operation.

The evidence at trial was clear and uncontradicted that this agreement was followed on twenty-six occasions between 1988 and 1994. The evidence was also undisputed that of the twenty-six Group Six Set-Up positions awarded between 1988 and 1994, the successful bidder on twenty-five of those awards had set-up experience on analogous equipment at Alco.[2] The union's representative testified at trial that in awarding these twenty-

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1. The only witness who testified differently was Grady Scott, Karen Karcher's stepfather. He stated that it was his understanding that the agreement was that the new positions would be awarded based solely on seniority.

2. Again, the only exception was Grady Scott, Karcher's stepfather, who told the company that he had set up experience at his own machine shop.

six job bids, Emerson had never violated the collective bargaining agreement.

Karen Karcher had been employed at Alco's St. Louis facility since March 19, 1976. Karcher was married to Jerry Karcher, who also worked at Alco as a quality assurance supervisor. A number of Karcher's other relatives had also been employed at Alco, including her mother, her stepfather, and her father-in-law. Karcher's only machine shop experience at Alco was working as an *operator*. By her own admission, she had never held a set-up position. In January of 1989, Karcher bid and was awarded the position of Group 2 machine operator. Karcher maintained that position through the date of trial.

In 1990 and 1992, Karcher bid on two Group Six Set-Up positions for the new computerized machinery, in spite of the fact that she did not have set-up experience on prior analogous machinery. Karcher was denied both positions, as were male employees who had more seniority than Karcher but who also lacked set-up experience. Karcher admitted at trial that she told the company that she should have been awarded the second job bid based solely on seniority. She also admitted at trial that the employees chosen for the two positions had set up experience, that she had never worked in a set up position and that the male employee awarded the 1992 Group Six Set Up position had better qualifications than she did.

After each denial of her bids for the Group Six Set-Up positions, Karcher filed a grievance with her union. The union refused to process the first grievance to arbitration because of lack of merit. It also withdrew the second grievance. Karcher also filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") and the Missouri Commission on Human Rights ("MCHR") after the job denials, alleging that she had been denied the positions because of a handicap and because of her sex.

Karcher also filed at least six workers' compensation claims for injuries she contended she received while working at Alco beginning on March 30, 1983 through January 10, 1994. Karcher admitted at trial that she attempted to discuss her workers' compensation claims and on-the-job injuries with her husband, Jerry Karcher, while he was employed at Alco as a quality assurance supervisor. Jerry Karcher testified at trial that his wife talked to him about her various claims against the company. He also testified that he attended monthly supervisor's meetings, at which status reports were presented regarding pending workers' compensation claims and grievances, including those of his wife. Other witnesses testified at trial that the information discussed at these meetings included the company's position on Karcher's grievances, the amount of money available for particular workers' compensation injuries, the possibility of settlement for workers' compensation injuries, and the company's position with respect to individual charges pending before the EEOC or MCHR. They also testified that they were uncomfortable discussing Karen Karcher's various claims, charges and grievances in front of her husband at these meetings. Jerry Karcher himself testified that he was "just a little bit" uncomfortable about having his wife's claims discussed.

In early 1990, after Karen Karcher applied for a job in the quality assurance department, Jerry Karcher told his superiors that if his wife were awarded the job, there would be a conflict and he would leave the company. He also told them that if there ever was a conflict of interest with his wife's position and his own, he would resign. When Karen Karcher was told during her testing for the position that her husband would leave the company if she were awarded the position, she left the test without completing it and was no longer considered for the job. In 1989, Jerry Karcher began looking for another job because he believed he was not being paid enough for the hours he was working.

In early December of 1991, Karen Karcher learned that a Group Six Set-Up position would become available because her stepfather, Grady Scott, who had been awarded the position, told her he was retiring. Karcher then attempted to contact the president of Alco about the potential job opening by going to his office and asking to speak with him. Karcher was told to go through the appropriate channels to bid for the position.

On December 9, 1991, Jerry Karcher's superiors held a meeting with him during which they told him about his wife's attempt to meet with the president. They also told him they believed that a serious conflict of interest had developed and that they would take him up on his previous offer to resign from the company when a conflict of interest arose. They then told him that he should take the next sixty days to begin looking for another job and that the company would help him with his job search. Jerry Karcher was not told he was being terminated and, at a later meeting, he was specifically told he was not being forced to resign. He did not find another job within sixty days, but continued to work at Alco. In July of 1992, eight months after the meeting, Jerry Karcher was offered a job at another company for a higher salary and left Alco at that time to take the position.

In January of 1994, Karen Karcher was issued a disciplinary warning for falsifying company records. Alco had instituted a "Safety Pays" bingo game in order to promote safety at the plant. The game enabled an employee to be awarded a jackpot after each day without a lost time accident. Karcher signed a sign-in sheet for the game on January 20, 1994, stating that she had not had any work related injuries during the previous game round. This information was not true as Karcher had filed a workers' compensation claim for injuries allegedly received on January 7, 1994. Accordingly, Karcher was disciplined for falsifying company records. Karcher filed a grievance over the report and

Alco removed the discipline from Karcher's file and agreed with the union that it would be "considered inactive."

While still employed at Alco, in November of 1992, Karcher filed a lawsuit against Emerson, alleging that Emerson had discriminated against her because of her sex by twice denying her a Group 6 Set Up position and had also retaliated for filing a charge of discrimination by issuing her the discipline for the bingo game and by telling her husband to find another job. Jerry Karcher was not a party to the lawsuit and never filed a claim of discrimination or retaliation against Alco. Accordingly, Emerson filed a motion to strike Karcher's claims of retaliation allegedly directed at her husband on the grounds that she lacked the statutory right and the standing to assert the Title VII rights of her spouse. The district court denied Emerson's motion to strike on April 22, 1993.

The case proceeded to trial on March 15, 1995 on Karcher's two claims of disparate treatment and two claims of retaliation.[3] The court denied Emerson's motion for judgment as a matter of law at the close of Petitioner's evidence and at the close of all evidence. The trial court also refused Emerson's proffered instruction to the jury that, in order to prevail, Karcher was required to prove a *prima facie* case of discrimination, including the fact that she was qualified for the positions for which she applied and that Emerson had the intent to discriminate against her. Instead, the trial court submitted the following verdict director on Karcher's claims of disparate treatment:

> *First,* Defendant failed to promote Plaintiff to the Group 6 position, and

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3. Karcher's claim of promotion denial in 1990 under Title VII was tried to the court; her other claims under Title VII and the MHRA were tried to a jury.

> *Second,* Plaintiff's sex was a motivating factor in Defendant's decision.

It also refused Emerson's proffered instruction on the elements of a *prima facie* case of retaliation.

The jury, having been so instructed, returned a verdict for Karcher on her claims of disparate treatment and retaliation. It awarded Karcher $25,000 for lost wages and benefits, $150,000 in emotional damages and $350,000 in punitive damages. The trial court denied Emerson's motion for judgment notwithstanding the verdict, for a new trial and/or to alter or amend judgment.

The Eighth Circuit Court of Appeals agreed with the district court that Karen Karcher had stated a claim upon which relief could be granted on her claim of retaliation allegedly taken against her husband by Alco. The appellate court held that she had standing to assert the Title VII rights of her husband, based on its conclusion that "[t]he evidence, viewed in Karcher's favor, supports a finding that Emerson's dismissal of her husband caused Karcher to suffer both economic and emotional damage." (Pet. App. A-10).

The Circuit Court of Appeals disagreed, however, with the district court's decision on jury instructions. It held that the instructions should have included a "specific provision" both on intent and on the requirement that Karcher prove she was qualified for the applied-for positions. (Pet. App. A-13-A-14). In spite of the fact that the jury awarded damages in the amount of $525,000, the appellate court held that the instructional errors were not prejudicial because, with respect to the intent requirement, the instruction given "was sufficient to convey to the jury that unless Emerson's actions were intentional, Karcher could not recover." (Pet. App. A-14). The court also held that the failure to instruct on the qualifications requirement was cured

by Emerson's closing argument, (Pet. App. A-14), even though the jury was also instructed that the closing arguments of counsel were not evidence. The court ruled similarly on the retaliation instruction. (Pet. App. A-14). Although by its own analysis, the jury was incorrectly instructed, the Court of Appeals also held that the judgment as a matter of law was properly denied because a jury could reasonably have believed (even after not being properly instructed) that Karcher was denied the two job bids on the basis of her sex and was retaliated against because of her claims of discrimination.[4] Based on this analysis, the Court of Appeals upheld the jury's award of lost wages, benefits and damages for emotional distress. It also concluded, however, that punitive damages had been improperly awarded because Karcher had not met the standard for the imposition of such damages under either Title VII or the MHRA.

REASONS FOR GRANTING THE WRIT

Should this Court grant the petition for writ of certiorari in this case, it will be called upon to review whether punitive damages should have been awarded against Emerson based on the evidence admitted at trial. Any such decision rests necessarily on the conclusion that Karen Karcher was entitled to sue for the alleged retaliation against her husband and that the jury's finding that Emerson should be required to pay damages to Karcher after it was incorrectly instructed on her claims of disparate treatment and retaliation was not reversible error. Such questions

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4. The Eighth Circuit's affirmance of the district court's denial of Emerson's motion for judgment as a matter of law appears to be based at least on part on evidence that was not admitted at trial, *i.e.*, that "more than six years after Emerson adopted procedures to choose people for this job, it still had not given any women the experience necessary to qualify her for the job." (Pet. App. A-9). All such evidence was specifically excluded by the trial court, although Petitioner argued that it was evidence of discrimination to the appellate court.

should be addressed before reaching the issue of what the correct standard for the imposition of punitive damages is in Title VII cases.

I.

THE EIGHTH CIRCUIT'S DECISION ON KARCHER'S ABILITY TO ASSERT HER HUSBAND'S TITLE VII RIGHTS IS IN CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS ON THE SAME ISSUE AND IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT.

In ruling that Karen Karcher was entitled to sue for her emotional damages resulting from Alco's actions towards her husband, the Eighth Circuit caused a serious conflict in the circuit courts of appeal regarding the ability of one employee to assert another employee's civil rights. It also raised significant federal questions regarding constitutional and prudential standing requirements which this Court should resolve.

Prior to the Eighth Circuit's decision in this case, the federal courts have been unanimous in rejecting discrimination claims premised on the assertion of a third party's rights. The circuit courts in both the Fifth and Ninth Circuits have denied the right of one employee to represent the rights of another in Title VII litigation. *Patee v. Pacific Northwest Bell Telephone Co.*, 803 F.2d 476 (9th Cir. 1986); *Luna v. International Assoc. of Machinists and Aerospace Workers Local #36*, 614 F.2d 529, 531 (5th Cir. 1980). In *Patee*, the Ninth Circuit Court of Appeals held that male employees lacked standing under Title VII to assert the claims of their female co-workers that they had been discriminated against on the basis of their sex. 803 F.2d at 477; *see also Ruffin v. County of Los Angeles*, 607 F.2d 1276, 1281

(9th Cir.), *cert. denied,* 445 U.S. 951 (1979) (male employees not entitled to maintain claims of unequal pay based on discrimination against female co-workers). In *Luna*, the Fifth Circuit concluded that the defendants in a Title VII case did not have standing to assert the constitutional rights of their opponent. 614 F.2d at 531. The Eighth Circuit's decision that Karen Karcher is entitled to enforce her husband's rights is directly in conflict with these three decisions.

Indeed, every single federal court which has ruled on the issue of one employee's right to sue under Title VII to protect the rights of his or her spouse or of another employee — except the court below — has ruled that neither Title VII nor Article III of the Constitution permit such claims. *Patee,* 803 F.2d at 477; *George v. Farmers Electric Cooperative, Inc.,* 715 F.2d 175 (5th Cir. 1983); *Luna,* 614 F.2d at 531; *Messer v. Meno,* 936 F. Supp. 1280 (W.D. Tex. 1996); *Patton v. United Parcel Service, Inc.,* 910 F. Supp. 1250 (S.D. Tex. 1995); *Miller v. Aristech Chemical Corp.,* 1995 WL 230246 (W.D. Pa. 1995); *Scott v. Dynasty Transportation, Inc.,* 1994 WL 160545 (E.D. La. 1994); *Ramos v. Roche Products,* 694 F. Supp. 1018 (D.P.R. 1988), *rev'd on other grounds,* 880 F.2d 621 (1st Cir. 1989); *Feng v. Sandrik,* 636 F. Supp. 77 (N.D. Ill. 1986). Whether analyzing the issue on the basis of statutory rights or constitutional standing, not one of these courts, or any other federal court, has ever permitted one employee to maintain an action for monetary damages asserting the Title VII rights of another employee or of a spouse. For example, in *Miller*, the district court for the Western District of Pennsylvania held that an employee had no standing to assert that her husband, also an employee of the defendant, had been denied a promotion in retaliation for his wife's complaints of sexual discrimination. 1995 WL at 230246. The court held, "Miller clearly does not have individual standing to assert that her husband was denied a promotion allegedly in retaliation for her complaints of

discrimination because it was Miller's husband who suffered the injury here (*i.e.*, the adverse employment action) and not Miller." *Id.* Similarly, in *Messer,* the district court for the Western District of Texas held that a female employee had no standing to prosecute the claims of alleged retaliation for her conduct experienced by other company employees. 936 F. Supp. at 1297.

These decisions are consistent with a long line of federal cases under the civil rights statutes holding that one person may not maintain a federal lawsuit based on the protected rights of a third party. *Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590, 592 (10th Cir. 1996) (Fair Housing Act claims); *Shanahan v. City of Chicago*, 82 F.3d 776, 780 (7th Cir. 1996) (claims under 42 U.S.C. § 1983); *Clay v. Fort Wayne Community Schools*, 76 F.3d 873, 877 (7th Cir. 1996) (Section 1983 claims); *Fobbs v. Holy Cross Health System Corp.*, 29 F.3d 1439, 1448 (9th Cir. 1994) (claims under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d), *cert. denied*, __ U.S. __, 115 S. Ct. 936 (1995); *Clifton Terrace Assoc., Ltd. v. United Technologies Corp.*, 929 F.2d 714, 721 (D.C. Cir. 1991) (Fair Housing Act and Section 1981 claims); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1307 n.1 (9th Cir. 1982) (Section 1983 claims). In *Clifton Terrace,* the District of Columbia Court of Appeals held, "Prudential limitations on standing ordinarily require that an action under section 1981 or 1982 be brought by the direct victims of the alleged discrimination because they are best suited to assert the individual rights in question." 929 F.2d at 721. Similarly, in *Halet,* the Ninth Circuit held that white plaintiffs do not have standing under Section 1983 to vindicate the rights of minorities who had suffered from racial discrimination. 672 F.2d at 1307 n.1.

The Eighth Circuit's decision throws into disarray this long line of cases and the well-established principle that one employee may not collect monetary damages for the violation

of another employee's rights, even when the other employee is a spouse. *See Souter v. Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 993 F.2d 595, 597 n.1 (7th Cir. 1993) (spouse did not have standing to sue union or employer for breach of the duty of fair representation and breach of collective bargaining agreement because she was not an employee or third party beneficiary of collective bargaining agreement). Just as in *Miller*, here it was the plaintiff's *husband*, not the plaintiff, who suffered the allegedly adverse employment action. Any right to be free from retaliatory conduct under Title VII remained at all times vested in Jerry Karcher, not Karen Karcher. Jerry Karcher filed neither an administrative claim nor a lawsuit. His wavier of rights could not be resurrected by Karen Karcher's allegations that the alleged retaliation directed at him damaged her rights under Title VII. The Eighth Circuit's decision in this case is entirely inconsistent with the constant refusal of the federal appellate courts to allow such claims.

Perhaps even more importantly, however, the Court of Appeals analysis is at odds with both the terms of Title VII itself and with this Court's well-established principles of prudential and constitutional standing.[5] Title VII permits a lawsuit to be brought by any "person claiming to be aggrieved." 42 U.S.C. § 2000e-5(f)(1). A person is aggrieved, for retaliatory purposes, when the employer discriminates against him "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C.

5. In *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972), this Court held that there was a " 'congressional intention to define standing as broadly as is permitted by Article III of the Constitution' " in the Civil Rights Acts, including Title VII. (*quoting Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 (3d Cir. 1971)).

§ 2000e-3(a). The courts have held that the phrase "persons aggrieved" encompasses employees or applicants for employment, but not spouses of employees. *Feng*, 636 F. Supp. at 81 ("spouses of individuals who have been victimized by employment discrimination cannot be said to fall within the class of persons Title VII was intended to protect"); *Patton*, 910 F. Supp. at 1278 ("[t]he spouse of an employee simply is not a covered individual under Title VII").

Karen Karcher was not an "aggrieved person" within the meaning of Title VII because the allegedly adverse employment action was not taken against her and, thus, she was not discriminated against or harmed within the meaning of Title VII. The fact that she was married to Jerry Karcher did not mean that the employment actions taken against him were also as a matter of law taken against her. Those actions did not affect *Karen Karcher's* employment, which is what Title VII was designed to protect. In other words, Karen and Jerry Karcher were not *ipso facto* the same person for purposes of Title VII. In this respect, Karen Karcher was no different than the spouses in *Feng* and *Patton*, who were not employed at the discriminating employers, because Karcher's employment was as unaffected by the employer's conduct as were those of the spouses in *Feng* and *Patton*.

While Karen Karcher may have suffered emotional distress[6] because of actions taken against Jerry Karcher, as she testified, such distress was not enough to qualify her as an "aggrieved person" under Title VII. She was no more aggrieved than the spouses in *Feng* and *Patton* who were also presumably mentally distressed for the actions taken against their spouses. In fact, if

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6. Petitioner presented no evidence at trial of precisely what her *economic* damages were which allegedly resulted from Alco's behavior towards her husband.

mental distress — or even financial loss — from an employment action were the sole criteria for determining whether a person was aggrieved under Title VII, the spouses of all employees discriminated against or retaliated against would be entitled to sue under the statute, as would all other individuals with emotional or financial relationships with an aggrieved employee, such as children, parents, relatives and friends. The purpose of Title VII was *not* to provide remedies for all those tangentially affected by employment actions; only those against whom the employment actions were directed are protected by the statute. *See Ramos,* 694 F. Supp. at 1026 ("[t]hough Congress intended Title VII to provide a broad foundation to remedy employment discrimination, it did not intend to provide a remedy to a spouse of a plaintiff having no employment connection with the employer").

The Eighth Circuit failed to recognize the implications of its extension of liability under Title VII, liability not provided for in the statute itself. It failed to understand that in permitting Karen Karcher to sue under Title VII for acts taken against her husband, it opened the door for a panolpy of lawsuits by those only marginally affected by adverse employment actions. Surely Title VII was not intended to remedy the indirect effects of discrimination on those related to the aggrieved party. Its scope is not so broad. *See Dollis v. Rubin,* 77 F.3d 777, 781-82 (5th Cir. 1995) ("Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions.").

The Eighth Circuit's analysis is also a fundamental departure from the prudential and constitutional standing analysis formulated and refined by this Court. Article III of the Constitution restricts the judicial power of the federal courts to actual "cases" or "controversies." *Lujan v. Defenders of Wildlife,*

504 U.S. 555, 560 (1992). As this Court explained in *Warth v. Seldin*, 422 U.S. 490, 498 (1975), "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues . . . [I]t is founded in concern about the proper — and properly limited — role of the courts in a democratic society." To invoke the jurisdiction of a federal court, a plaintiff must show "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), that the injury "fairly can be traced to the challenged action," and that it "is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976); *see also Lujan*, 504 U.S. at 560; *Allen v. Wright*, 468 U.S. 737, 753 (1984); *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982); *Warth*, 422 U.S. at 498; *Sierra Club v. Morton*, 405 U.S. 727, 740-41 n. 16 (1972). The party invoking the federal courts' jurisdiction has the obligation to prove that he or she is entitled to an adjudication of the claims asserted. *Allen*, 468 U.S. at 750.

The Court of Appeals largely ignored the constitutional parameters on federal jurisdiction in concluding that Karcher was able to sue for allegedly retaliatory actions taken against her husband. Although citing *Allen's* requirement that a plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief," 468 U.S. at 751, the Eighth Circuit neither applied that standard to Karcher's complaint nor analyzed it with respect to the evidence presented at trial. The lower court's entire analysis of this issue consisted of the following:

> The evidence, viewed in Karcher's favor, supports a finding that Emerson's dismissal of her husband caused Karcher to suffer both

> economic and emotional damage. Although her husband received a higher paying job, the job offered him (and thus her) fewer benefits. Moreover, Karcher testified that she felt responsible for causing her husband to leave a job that he liked and that this cause her emotional stress and placed an additional strain on her marriage. The testimony of her psychiatrist and psychologist corroborated Karcher's claims of emotional distress.

(Pet. App. at A-10). The court failed to engage in any reasoned analysis of either the injury or the causation requirements for standing, as it was compelled to do pursuant to this Court's holding in *Allen.*

Indeed, the Eighth Circuit's reasoning completely ignores this Court's holding in *Gladstone* that "the plaintiff must show that he *personally* has suffered some actual or threatened injury," 441 U.S. at 99 (emphasis added), as well as the requirement that that injury be "distinct," "palpable," "concrete," *Warth,* 422 U.S. at 501, and the invasion of a "legally protected interest." *Lujan,* 504 U.S. at 560. Here, Karcher's claims of injury met none of those requirements. The alleged adverse employment action was taken against her husband and, thus, she did not *personally* suffer an adverse employment action. Nor was the alleged damage distinct from that of her husband. The husband/wife relationship does not make one spouse the legal equivalent of his or her mate, but the Eighth Circuit's reasoning appears to so hold. As this Court held in *Allen,* "Our cases make clear . . . that such injury accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." 468 U.S. at 754 (*quoting Heckler v. Mathews,* 465 U.S. 728, 739-40 (1984)). Karen Karcher was not "personally denied equal treatment" when her husband was told to find another job.

Moreover, the Eighth Circuit failed to recognize that Karen Karcher did not suffer the invasion of a legally protected interest. Title VII grants only an "aggrieved person" the right to file a charge of discrimination and a lawsuit. 42 U.S.C. §§ 2000e-5(b), (f)(1). As discussed above, Karcher was not an aggrieved employee with respect to actions taken against her husband. Karcher had no rights conferred by statute to be free from emotional or financial injury because of retaliation against her husband. Only Jerry Karcher had those rights. Nor did Karen Karcher have any special rights conferred upon her by Title VII because she was Jerry Karcher's wife. Nothing in Title VII indicates that the legislative intent of the statute was to protect all relatives of employees adversely affected by discriminatory conduct. Thus, Karen Karcher had no legally protectible interest under Title VII and had no "injury in fact" for standing purposes.

The Eighth Circuit compounded its erroneous analysis by refusing to acknowledge that the indirectness of Karcher's alleged injury indicated that she did not have standing to pursue her husband's remedies. In *Allen,* this Court held that parents of black children attending public schools in school districts undergoing desegregation did not have standing to challenge the Internal Revenue Services' standards promulgated to fulfill its obligations to deny tax-exempt status to racially discriminatory private schools. 468 U.S. at 765. The Court based its conclusion on the fact that the plaintiffs had not alleged a direct injury suffered by them personally and because the alleged harm was not fairly traceable to the alleged unlawful conduct. *Id.* at 750, 754. The Court concluded that the injury to the plaintiffs was "highly indirect" and that "[t]he links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing." *Id.* at 757-58; *see also Warth,* 422 U.S. at 505 ("the indirectness of the injury . . . may make it substantially more difficult to meet the minimum requirements of Art. III").

Karen Karcher's claims in this case were equally indirect. It is undisputed that the adverse employment action at issue was taken against her husband and not against Karcher. Karcher was affected only indirectly and her employment itself was unaffected. Her alleged injury was, therefore, not fairly traceable to the allegedly unlawful conduct. The chains of causation were as weak in this case as they were in *Allen*. The Eighth Circuit, however, did not even examine the weakness of this link, concluding summarily only that Karcher "felt responsible" for her husband's resignation from Alco.

Nor did the Court of Appeals engage in any analysis whatsoever of the prudential limitations imposed on a third party's ability to vindicate the rights of another. This Court has recognized that a litigant "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499; *accord United States Dept. of Labor v. Triplett*, 494 U.S. 715, 720 (1990); *Valley Forge Christian College v. American United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982). In *Triplett*, this Court stated, "This is generally so even when the very same allegedly illegal act that affects the litigant also affects a third party." 494 U.S. at 720 (citing *United States v. Payner*, 447 U.S. 727, 731-32 (1980)). A limited exception to this rule applies, however, when three conditions are met: "The litigant must have suffered an injury in fact, thus giving him or her a sufficiently concrete interest in the outcome of the issue in dispute . . . the litigant must have a close relation to the third party, . . . and there must exist some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991) (internal quotations and citations omitted); *see also Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 629 (1991) (applying *Powers* test to civil case).

Other federal courts have applied this three part prudential

test in determining whether a litigant was prohibited from asserting the rights of a third party in civil rights cases. *Shimer v. Washington,* 100 F.3d 506, 508 (7th Cir. 1996); *Shanahan*, 82 F.3d at 780; *Clifton Terrace,* 929 F.2d at 721. In *Shanahan,* the Seventh Circuit Court of Appeals held that a civil rights plaintiff asserting a claim under 42 U.S.C. § 1983 could not establish the second or third elements of the *Powers* test and, therefore, lacked standing to prosecute the rights of a third party. 82 F.3d at 780.

In this case, however, the Eighth Circuit did not even consider these limitations on third party standing and it completely ignored this Court's decision in *Powers.* Had it applied the test announced in *Powers,* it would have been clear that Petitioner could not meet the third party standing prerequisites. As demonstrated above, Petitioner did not suffer a cognizable "injury in fact" to a legally protected interest under Article III. Nor was the third party whose rights she sought to vindicate unable to assert those rights himself. Jerry Karcher was perfectly able to file a charge of discrimination under Title VII and file a lawsuit against Emerson. He did not do so. There was simply no indication that Jerry Karcher was incompetent to assert this own rights or that significant hurdles obstructed his ability to do so. *See Shanahan,* 82 F.3d at 780 (third party standing lacking when aggrieved parties faced no obstacles in bringing the claims themselves). Petitioner did not establish, as she was required to do to invoke the federal court's jurisdiction, that Jerry Karcher could not have pursued his own rights and remedies under Title VII.

The Court of Appeals' cursory and incomplete analysis of Karcher's standing to assert her husband's Title VII claims departs so fundamentally from this Court's precedent that review of the decision is necessary. Without such review, the Eighth Circuit's decision will open a veritable Pandora's Box of

attenuated, indirect claims of injury under Title VII which had hitherto been foreclosed by the other federal court's rulings on the nature of Title VII rights and remedies. Should the Court grant the petition for certiorari and decide the issue of punitive damages, it must also decide whether the district court had jurisdiction over Karcher's claims of retaliation on behalf of her husband and whether such claims were properly before the jury. Consequently, if the Court grants the petition for writ of certiorari, it should also grant this conditional cross petition.

II.

THE EIGHTH CIRCUIT'S DECISION ON JURY INSTRUCTIONS RAISES AN IMPORTANT QUESTION OF FEDERAL LAW UNDER TITLE VII WHICH CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE FEDERAL COURTS OF APPEALS.

The conclusion of the Court of Appeals that the instructions issued to the jury were erroneous but not prejudicial raises a significant question regarding the correct instructions to be given juries in Title VII cases. The court's decision is an example of the confused and conflicting opinions on the issue among the circuit courts of appeals. The plethora of contradictory holdings in this area in the various courts of appeals provides no guidance to the trial courts as to precisely what elements a jury should be instructed on in reaching its verdict and clarification to the lower courts is necessary.

In this case, the Court of Appeals held that at least two elements of the *prima facie* case for discriminatory promotion denial — intent to discriminate and qualification for the position — should have been given to the jury. (Pet. App. A-13-14). At the same time, in another case, the Eighth Circuit held that district courts in age discrimination cases "are constrained to

instruct juries on the elements of the prima facie case." *Kehoe v. Anheuser-Busch*, 96 F.3d 1095, 1104 (8th Cir. 1996). Other circuit courts have also held that the jury should be charged with a *prima facie* case instruction. *Scarfo v. Cabletron Systems, Inc.*, 54 F.3d 931, 937 (1st Cir. 1995); *Gafford v. General Electric Co.*, 997 F.2d 150, 166-67 (6th Cir. 1993); *Lynch v. Belden & Co.*, 882 F.2d 262, 267 (7th Cir. 1989), *cert. denied*, 493 U.S. 1080 (1990); *Haring v. CPC Int'l, Inc.*, 664 F.2d 1234, 1237 (5th Cir. 1981); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1017 (1st Cir. 1979). Still other circuit courts, however, have held that district courts should *not* offer instructions on the elements of the *prima facie* case. *Woodhouse v. Magnolia Hosp.*, 92 F.3d 248, 257 (5th Cir. 1996); *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 2612 (1995); *Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471, 1476 (5th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 126 (5th Cir. 1992); *Nelson v. Green Ford, Inc.*, 788 F.2d 205, 207-08 (4th Cir. 1986).

At least some of this confusion regarding instructions appears to stem from the lower courts' misinterpretation of this Court's holding in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). In *Aikens*, this Court held that the burden-shifting analysis set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), falls from a disparate treatment case when the plaintiff has demonstrated a *prima facie* case and the employer offers evidence of the legitimate, non-discriminatory reasons for its employment actions. Some courts have held that the decision in *Aikens* precludes instructing the jury in the elements of a *prima facie* case. *Olitsky*, 964 F.2d at 1478; *Walther*, 952 F.2d at 126; *Nelson*, 788 F.2d at 208. In fact, prior to the Eighth Circuit's decisions in this case and in *Kehoe*, the Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit instructed the district courts that they should not instruct on the three-step burden shifting analysis

of *McDonnell Douglas.* These authorities have ignored the fact that this Court's decision in *Aikens* did not address the issue of jury instructions because it was the review of a bench tried case. 460 U.S. at 712.

The instructions given in this case and the Court of Appeals' conclusion regarding those instructions aptly illustrates the confusion prevalent in the lower courts on this issue. The jury in this case was instructed to determine only whether Petitioner was denied the two promotions at issue and whether "Plaintiff's sex was a motivating factor in Defendant's decision." The first element of this instruction was not even at issue. Consequently, the jury listened to eight days of testimony and was then asked to reach a legal conclusion without any instruction guiding it through the legal process it must use. The Court of Appeals correctly concluded that the verdict director funneling all issues in the case into one question was improper. (Pet. App. A-13). It held that the verdict director should also have included specific instructions on two of the elements of a *prima facie* case: that the plaintiff was qualified for the position for which she applied and that the defendant intended to discriminate against her. (Pet. App. A-13-A14). It made a similar conclusion with respect to the verdict director on Petitioner's retaliation claims.

The Eighth Circuit's analysis in this case does nothing more than add to the overall confusion among the lower courts about which instructions to give a jury. The trial courts in the Eighth Circuit are now required under the Court of Appeals' decision in this case to instruct the jury on *some* of the elements of a *prima facie* case (although failure to do so does not result in reversible error); under its decision in *Kehoe,* they are required to instruct the jury on *all* the elements of a *prima facie* case. In the Fourth and Fifths Circuit, however, jurors may not be charged with any of the elements of a *prima facie* case of discrimination. *Olitsky,* 964 F.2d at 1478; *Walther,* 952 F.2d at 126; *Nelson,* 788

F.2d at 208. In the First and Sixth Circuits, trial courts may given the entire *McDonnell Douglas* burden shifting analysis in their instructions, including the *prima facie* case. *Scarfo,* 54 F.3d at 937; *Gafford,* 997 F.2d at 166. The inconsistency between the appellate courts' opinions on this issue demonstrates that some clarification needs to be given so that trial courts are not left in the dark at the close of a trial when they must charge a jury.

The Eight Circuit's conclusion that no reversible error occurred by failure to give the appropriate instructions is an even further indication of the confused state of the law on this issue. Because the Court of Appeals held that the erroneous instructions were not prejudicial, the lower courts are essentially free to ignore the Eighth Circuit's admonition that a specific instruction on intent and qualifications must be given when the one in this case did not contain such a provision and was not found to be reversible error. Moreover, because the appellate court held that closing argument may cure instructional errors, the parties will be left with a Hobson's choice at trial: not to argue the correct law during closing and hope for reversal on appeal because the error was not corrected and hence prejudicial, or to argue the correct law in closing and effectively waive any appeal because of non-prejudicial error. This unfair choice is also unrealistic because it assumes that a jury, after having been instructed on its duty to follow the court's instructions and of its right to ignore the arguments of counsel, will suddenly do the opposite, that is, that it will ignore the court's erroneous recitation of the law and instead follow a lawyer's correct statement of the law.

Indeed, the Court of Appeals' conclusion that the instruction error was not prejudicial is contrary to common sense. The jury, after being incorrectly instructed, awarded Karcher $525,000 in damages. If such an award was not evidence of

prejudice, nothing is. In fact, there was no other way for Emerson to show prejudice. The Eighth Circuit's holding that Emerson was not entitled to judgment as a matter of law on Karcher's promotion claims is equally inexplicable as it was based on the finding that the jury could have found that the denial of the two job bids was motivated by Karcher's sex *after* the jury had been incorrectly instructed on the issue.

Improper instructions have long been held to constitute prejudicial error warranting reversal and a new trial. *Chandris, Inc. v. Latsis*, __ U.S. __, 115 S. Ct. 2172, 2192 (1995); *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 734 (1989); *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25*, 430 U.S. 290, 305 (1977); *Houghton v. Sipco, Inc.*, 38 F.3d 953, 959 (8th Cir. 1994); *Ackley v. Chicago & Northwestern Transportation Co.*, 820 F.2d 263 (8th Cir. 1987); *Board of Water Works Trustees v. Alvord, Burdick & Howson*, 706 F.2d 820 (8th Cir. 1983); *Loeb*, 600 F.2d at 1018; *Phillips v. State Farm Mutual Automobile Ins. Co.*, 437 F.2d 365, 368 (5th Cir. 1971). In *Jett*, for example, this Court held that the failure to give an instruction distinguishing between two types of evidence resulted in a risk that the jury verdict was for damages for a claim that was not properly before the jury and hence, reinstatement of the verdict was inappropriate. 430 U.S. at 305. Similarly, in *Chandris*, this Court held that an overly broad instruction was improper and required remand. __ U.S. at __, 115 S. Ct. at 2192.

In *McGinnis Piano and Organ Co. v. Yamaha Int'l Corp.*, 480 F.2d 474, 480 (8th Cir. 1973), the Eighth Circuit stated, "The jury might have awarded a comparable verdict under proper instructions, but it is not for us to speculate that such would have been the case." Yet by ruling that no reversible error occurred when the jury had not been instructed correctly in this case, the Court of Appeals ignored its own admonition. Instead,

it effectively speculated that the jury would have awarded the same amount if it had been correctly instructed. Such speculation was improper and the Eighth Circuit's analysis finding it nonprejudicial was inherently flawed and contrary to well-established precedent on the issue.

In short, the Eighth Circuit's decision that the verdict director was incorrect but did not constitute reversible error illustrates poignantly the confusion prevalent in the lower courts on the issue of the proper instructions given to juries in discrimination cases. This Court should take the opportunity to clarify to the lower courts the appropriate instructions to be given in such cases.

CONCLUSION

Should this Court grant the petition for writ of certiorari, the underlying issues of Petitioner's ability to assert the rights and remedies of her husband under Title VII would necessarily require examination by this Court. Similarly, the proper instructions to be given in discrimination cases merits review because of the substantial federal questions raised.

For these reasons, should the Court grant the petitioner for writ of certiorari, it should also grant this conditional cross-petition for writ of certiorari.

Respectfully submitted,

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